IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PATRICK D. OSTERHOFF,

Petitioner,

vs.

ROBERT O. LAMPERT,

Respondent.

Civil No. 01-1322-AA
OPINION AND ORDER

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AIKEN, Judge:

Petitioner filed a petition for writ of habeas corpus

pursuant to 28 U.S.C. § 2254; and alternatively for an evidentiary hearing. The petition and alternative request for evidentiary hearing are denied, and the case is dismissed.

BACKGROUND

Petitioner brings this habeas petition to challenge his 1997 conviction for Murder By Abuse. The case involves the death of petitioner's child, shortly after the child's birth, as a result of "shaken baby syndrome."

Petitioner plead not guilty and waived his right to a jury trial. The trial judge found petitioner guilty of Murder and sentenced petitioner to a 300-month prison term pursuant to Or. Rev. Stat. 137.700-137.707 ("Measure 11"). Petitioner directly appealed the conviction and sentence, however the Oregon Court of Appeals affirmed the trial court without a written opinion in State v. Osterhoff, 155 Or. App. 488, 967 P.2d 530 (1998). The Oregon Supreme Court denied review. State v. Osterhoff, 327 Or. 554, 971 P.2d 410 (1998). Petitioner then filed a petition for Post-Conviction Relief (PCR) alleging claims regarding the constitutionality of a Measure 11 sentence, and 22 claims against trial counsel. The PCR court denied relief on all of petitioner's claims after a post-conviction hearing. The post-conviction trial court noted that "although Petitioner is dissatisfied with the *result*, he has **no basis** on this record to contend that he suffered *ineffective assistance of counsel.*

Resp. Ex. 121 (emphasis in original).

Petitioner appealed the PCR trial court's decision, raising only nine of the claims against counsel. The Court of Appeals affirmed the PCR trial court ruling without opinion. Osterhoff v. Lampert, 171 Or. App. 335, 14 P.3d 104 (2000). The Oregon Supreme Court again denied review. Osterhoff v. Lampert, 332 Or. 239, 28 P.3d 1175 (2001).

In petitioner's Amended Memorandum of Law in Support of Petition for Writ of Habeas Corpus; Alternative Request of Evidentiary Hearing, he pursues four claims. Specifically, petitioner alleges that trial counsel was ineffective by: (1) persuading him to waive jury trial without fully advising him of the advantages and disadvantages of doing so; (2) failing to develop and present a coherent defense; (3) advising him not to testify; and (4) failing to conduct a thorough investigation of the case. In support of these claims, petitioner submits three new exhibits that were not presented to the Oregon state courts during his PCR proceedings. Petitioner further requests an evidentiary hearing to develop additional evidence in support of his claims.

## STANDARD OF REVIEW

A district court may not grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court unless the state court's decision was: (1) "contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct, and petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). "Clearly established Federal law" means the holdings, and not the dicta of the relevant Supreme Court decisions in effect at the time of the state trial. Williams v. Taylor, 529 U.S. 362, 405 (2000).

The "contrary to" clause means that a state court decision is "contrary to clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent." Lockyer v. Andrade, 538 U.S. 63, 73 (2003).

The "unreasonable application" clause means that "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 75. The "unreasonable application"

clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable. Id.

Habeas relief is warranted only if the constitutional error at issue had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). When a state court reaches a decision on the merits but provides no reasoning to support its conclusion, the federal habeas court must conduct an independent review of the record to determine whether the state court clearly erred in its application of Supreme Court law. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). In such a case, even if the district court independently reviews the record, it still defers to the state court's ultimate decision. Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

## DISCUSSION

### I. Claims not raised in Amended Memorandum

Initially, petitioner's claims that were raised initially but never briefed are denied. Petitioner failed to respond or rebut respondent's arguments against those claims. See 28 U.S.C. § 2248 ("The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.")

Petitioner has not provided the court with any briefing or argument to counter respondent's arguments against those initial claims. Moreover, the court finds no evidence in support of those claims. Therefore, those claims are dismissed.

II. Petitioner's Exhibits A, B and C

Petitioner relies on Rule 7 of the Rules Governing Cases Under § 2254 (Rule 7) to expand the record in this case to include Exhibits A, B and C. Habeas petitioners are not entitled to expand the record under Rule 7 with new evidence that supports the merits of their claims unless they demonstrate that they are entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2). Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir.), cert. denied, 126 S. Ct. 442 (2005). See also, Holland v. Jackson, 542 U.S. 649, 653 (2004)(the "same restrictions [that apply to an evidentiary hearing] apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing.").

Here, petitioner is not entitled to an evidentiary hearing to develop the merits of his claims with the information contained in Exhibits A-C because § 2254(e)(2) specifies that if a federal habeas petitioner "failed to develop the factual basis of a claim" in state court, the federal court shall not hold an evidentiary hearing so that the petitioner may further develop the claim unless the petitioner shows that the claim relies on

(1) a new and retroactive rule of constitutional law; or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence[.]" 28 U.S.C. § 2254(e)92)(A)(I)-(ii). Further, the facts a petitioner seeks to develop, if true, must establish by clear and convincing evidence that no reasonable fact finder would have found the petitioner guilty. 28 U.S.C. § 2254(e)(2)(B).

Exhibit A is a letter sent to petitioner by trial counsel's office manager in July 1996. The one paragraph letter requests that petitioner refrain from placing collect phone calls to trial counsel due to the "significant" charges incurred by the firm for petitioner's numerous calls. The letter instructs that petitioner's attorney will "be in touch with you as needed." Ex. A. Exhibits B and C are letters trial counsel sent to the trial court in September and December 1996. The September letter was in lieu of a "status report conference call," although both letters focus primarily on scheduling issues. It is notable that petitioner does not assert that he did not know about the existence of these letters during his underlying criminal proceedings. Moreover, it is reasonable to assume that if petitioner had exercised "due diligence," he could have offered Exhibits A-C in support of his claims during his PCR proceedings. Therefore, petitioner's Exhibits A-C will not be admitted for the first time in this proceeding.

III. Procedural Default

Petitioner's first claim is that trial counsel performed ineffectually by persuading petitioner to waive his jury trial rights without fully advising him of the advantages and disadvantages of doing so. Petitioner asserts that this claim is based on the following: (1) counsel decided to waive a jury before completing his investigation; and (2) the trial judge could not be an impartial fact finder because counsel had notified the court of his motion to enforce a purported plea bargain. Petitioner's Amended Memorandum, p. 19-21. Petitioner also argues that counsel's ineffectiveness amounted to "structural error" that entitles him to relief without proving prejudice. Id. at 21-22.

Neither of petitioner's ineffective assistance of counsel claims were raised in petitioner's PCR petition for review to the Oregon Supreme Court. Nor did petitioner ever present the Oregon courts with an argument that counsel's alleged ineffectiveness amounted to a "structural error." Instead petitioner argued to the Oregon courts that counsel was ineffective in failing to advise petitioner of the benefits of a jury trial because: (1) petitioner was mentally impaired and could have received sympathy from a jury; and (2) petitioner could not make a reasonable choice because he was under the influence of a antidepressant.

I find that petitioner procedurally defaulted his

ineffective assistance claims argued in pages 19-25 of his Amended Memorandum. See Carriger v. Lewis, 971 F.2d 329, 333-34 (9th Cir. 1992)(en banc)(ineffective assistance of counsel claims are discrete and each must be properly exhausted or will be defaulted).

IV. Analysis of State Court Decision

Even if petitioner's claims are not procedurally defaulted, I find the state court decisions denying petitioner relief, reasonable. As noted above, habeas relief may not be granted on any claim that was adjudicated on the merits in state court, unless the adjudication resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d) as modified by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). To prove an ineffective assistance of counsel claim, a petitioner must show: (1) trial counsel's performance was deficient in that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed defendant by the Sixth Amendment; and (2) this deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Under Strickland, a petitioner alleging ineffective assistance of counsel must show (1)

counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Id. at 694.

Petitioner first alleges that counsel persuaded petitioner to waive his jury trial rights without fully advising him of the advantages and disadvantages of doing so. I find no claim or allegation by petitioner that he did know that he had a right to a jury trial. Therefore, petitioner's "structural defect" argument fails. Petitioner does not allege that he was denied a jury trial over his objection, nor does he allege that he was incorrectly informed that he did not have a right to a jury trial for each of his offenses. See Campbell v. Rice, 408 F.3d 1166 (9th Cir.), cert. denied, 126 S. Ct. 735 (2005)(list of "structural errors" recognized by the United States Supreme Court).

Therefore, the issue before this court is whether counsel performed deficiently in advising petitioner about his right to jury trial; and if so, whether his waiver of that right was knowing, intelligent and voluntary. Based on the record before this court, I find that trial counsel's alleged ineffective performance does not satisfy the Strickland standards. Trial counsel has stated that, "I discussed [petitioner's] options with regard to a jury trial very thoroughly with him." Resp. Ex. 119

at 7, ¶ 21. Moreover, prior to accepting petitioner's guilty plea, the trial court engaged in the following dialogue with petitioner:

> [Counsel]: Now, the other matter, and it's a very important one, is the matter of a jury waiver. I have talked with Mr. Osterhoff quite a lot about this issue about whether to have a jury trial or a court trial. And he elected to have a court trial, and he's willing to sign the necessary jury waiver.
>
> . . .
>
> [Court]: Mr. Osterhoff, under our Constitution . . . you have a right to have your guilt or your innocence as charged against you decided not by a judge, not by a single person, but by a jury; that is, by a group of people just drawn randomly from the community who would listen to whatever evidence may be produced against you and decide whether or not you've been proven guilty beyond a reasonable doubt of any charge that may be brought against you. That is your absolute right. Nothing requires you to give that right up. Now, you may waive that right. Waive means give it up. You can surrender that right. And if you do that, you are then agreeing that a judge, rather than a jury, will make all the decisions regarding your guilt or innocence of the charge against you. Do you understand that?
>
> [Petitioner]: Yes, sir.
>
> [Court]: What I'm hearing from [counsel] and he said this for quite a while just informal phone conferences that we have, is that you do not wish to have jury trial; you wish to have those issues resolved instead by a judge.
>
> [Petitioner]: Yes, I do.
>
> [Court]: That is your desire?
>
> [Petitioner]: Yes.
>
> [Court]: You've had the opportunity to consult with Mr. Vogt regarding -

[Petitioner]: Yes, sir, we've consulted many times.

[Court]: You'll need to sign a written waiver of jury trial. Oregon law requires that any waiver of the right to jury trial be done in writing.

[Petitioner]: Okay.

Jury Waiver Transcript, p. 5-7.

The Supreme Court has noted that "[s]olemn declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 73 (1977). The PCR court found that "[n]ot only did Defense Counsel thoroughly cover the subject with the Petitioner, the Trial court covered Petitioner's right to a jury trial and the meaning of a waiver of that right in detail." Resp. Ex. 121 at p. 5. Based on the transcript of the trial court's findings accepting petitioner's waiver of a jury trial, and trial counsel's representation to the trial court and separate post-trial declaration stating that he had discussed this issue thoroughly with petitioner, the PCR court's finding quoted above was reasonable and the state court's denial of petitioner's claim was neither "contrary to," nor an "unreasonable application of, clearly established federal law." 28 U.S.C. § 2254(d).

Petitioner next alleges that trial counsel's performance was deficient in that he presented conflicting defenses and failed to call an expert witness to support a mental infirmity defense. Amended Memorandum, p. 25-26. Presumably, petitioner asserts

that a defense based on the argument that the state failed to prove beyond a reasonable doubt that petitioner, as opposed to child's mother (Stewart), committed the fatal injury is inconsistent with a mental defense based on lack of intent. I find the trial counsel's decisions in this regard reasonable. Moreover, even assuming trial counsel may have been deficient in this regard, I find no prejudice to petitioner based on trial counsel's declaration that petitioner did not have a viable mental defense. See Resp's Ex. 119, Vogt Aff, p. 2-4, ¶¶ 3,4,7. Trial counsel declared:

> 3. . . . The fact is I had Mr. Osterhoff examined by a very competent forensic psychologist, Dr. Robert Stanulis. My initial plan when going into the trial were to present a diminished capacity/partial responsibility defense. I thought, based on what Dr. Stanulis told me, Mr. Osterhoff was the victim of organic brain damage. I had him sent to the office of a psychologist in Monmouth to do a "brain scan" and this proved to be negative for brain damage. In other words, he did not have any kind of organic brain syndrome and, the psychologist that reviewed him for routine mental heath problems could not find anything that constituted a defense. Thus, I did not present these experts at trial. The issue of his mental status was, in fact, thoroughly investigated by my office and I felt it was handled appropriately during the course of the trial. It is very difficult to present a defense of this nature when the defendant's own expert does not agree with it.

Id.

I find no evidence that there exists a reasonable probability that the outcome of petitioner's case would have been different if trial counsel had either (1) argued a mental defense; or (2) not mentioned that defense at all. Therefore,

relief on petitioner's second ineffective assistance of counsel claim is denied.

Petitioner's third ineffective assistance of counsel claim is counsel's alleged advice to petitioner not to testify at trial. Amended Memorandum, p. 26-27. Trial counsel declares in response that petitioner's claim "is absolutely false. I discussed thoroughly Mr. Osterhoff's option of testifying and he declined to do so." Resp. Ex. 119, p. 6, ¶ 15. Further, the PCR court found:

> In view of the fact that Petitioner declined the advice of his Defense Counsel with respect to accepting a plea offer, it is unlikely that Defense Counsel's advice that Petitioner not testify, if in fact such occurred, would have caused Petitioner to do other than he decided to do[.] This Court finds that Petitioner's options were explained to him, and Petitioner himself determined that he would not testify in his trial.

Resp. Ex. 121, p. 4, ¶ 10.

Relying on trial counsel's statements and the PCR court's specific factual findings on this matter, I find the state court's decision to deny relief on this claim reasonable.

Petitioner's final ineffective assistance of counsel claim is an allegation that counsel failed to conduct a thorough investigation. Specifically, petitioner alleges that counsel should have more thoroughly investigated petitioner's assertion that Stewart killed her son. Petitioner fails to point to any evidence in existence during petitioner's criminal proceedings that support petitioner's allegation. Moreover, the record does

not support that trial counsel either performed deficiently, or that petitioner suffered any prejudice by counsel's actions or decisions in this regard. See Resp. Ex. 119, p. 4,7, ¶¶ 7,19. Therefore, I find that the state court's decision rejecting petitioner's claim was neither "contrary to," or an "unreasonable application of existing federal law." Petitioner's request for relief is denied.

In conclusion, I find that the state courts' decisions to deny relief on petitioner's claims were neither "contrary to," nor an unreasonable application of" the ineffective assistance of counsel standard as outlined in Strickland. Petitioner's claims, pursuant to 28 U.S.C. § 2254, as modified by the AEDPA, are denied.

## CONCLUSION

Petitioner's habeas corpus petition and alternative request for evidentiary hearing (doc. 1) is denied and the case is dismissed.

IT IS SO ORDERED.

Dated this 28 day of August 2007.

Ann Aiken
United States District Judge